

Endicott Forging and Manufacturing, Inc. and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO. Case 3-CA-20541

April 19, 1999

DECISION AND ORDER

BY MEMBERS FOX, HURTGEN, AND BRAME

Upon a charge filed by the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO (the Union) on February 28, 1997, the General Counsel issued a complaint on December 31, 1997, against Endicott Forging and Manufacturing, Inc., the Respondent, alleging that it has violated Section 8(a)(1) and (5) by failing to make contractually mandated pension plan contributions. Copies of the complaint and notice of hearing were served on the Respondent. On February 9, 1998, the Respondent filed a letter in response to the complaint. Although the Respondent admits in its letter the operative facts giving rise to the unfair labor practice allegations, it asserts that the reason for not making necessary pension plan contributions resulted from the financial condition of the Company.

On February 24, 1998, the General Counsel filed a Motion to Transfer Proceeding to Board, and for Summary Judgment and Issuance of Board's Decision and Order. The General Counsel asserts, inter alia, that the Respondent's answer essentially admits all the allegations of the complaint and raises no material issues of fact warranting a hearing and that the Respondent's affirmative defenses, even if proved, would not constitute an adequate defense to the allegations in the complaint. On February 27, 1998, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits the operative facts giving rise to the unfair labor practices alleged in the complaint. It acknowledges that it has, since 1944, recognized the exclusive representative status of the Union, that recognition was embodied in a collective-bargaining agreement which was effective from May 16, 1996, to May 16, 1997, and that the unit alleged in the complaint is appropriate for collective bargaining. It also admits that, on the dates alleged in the complaint, it has failed to remit payments to the pension fund to which it was obligated to contribute under the collective-bargaining agreement.

As an explanation for its unilateral failure to adhere to the contract, the Respondent claims that the failure to make the pension payments resulted from the financial

condition of the Company. However, a claim of financial difficulty, "even if proven, does not constitute an adequate defense to an allegation that an employer has unlawfully failed to abide by the provisions of a collective-bargaining agreement." *Zimmerman Painting & Decorating*, 302 NLRB 856, 857 (1991).¹

Therefore, we find that the Respondent has not raised any issue properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a New York corporation with its principal office and place of business located in Endicott, New York, is engaged in the manufacture and sale of metal forging. During the 12-month period preceding the issuance of the complaint, the Respondent, in conducting its business operations, purchased and received goods and materials valued in excess of \$50,000 which were shipped to its Endicott facility directly from points located outside the State of New York. We find the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Unit and the Union's Representative Status

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All employees in production and maintenance (but excluding the die department, office, clerical employees, and all supervisors, foremen and assistant foremen in charge of any classes of employees) for whom the union, is or may be, during the term of this Agreement,

¹ We note that the Board has found that this Respondent violated Sec. 8(a)(5) and (1) of the Act by failing to provide contractual benefits on three other occasions in recent years. See *Endicott Forging & Mfg.*, 319 NLRB 1 (1995) (failure to maintain contractually required health and dental benefits); 319 NLRB 180 (1995) (failure to pay medical claims under a program of self-insurance and to provide medical and dental insurance coverage); 322 NLRB No. 4 (1996) (not reported in Board volumes) (failure, inter alia, to make payments into the employees' contractual 401(k) pension plan and to make annual and quarterly contractual bonus payments). The Respondent, as here, claimed economic necessity in the first two cases, and filed no answer to the complaint in the third case. Subsequently, the Respondent filed no answer to the General Counsel's compliance specification covering the first two cases. See *Endicott Forging & Mfg.*, 323 NLRB No. 128 (1997) (not reported in Board volumes). Because the Respondent is a recidivist as our colleague points out in his dissent, we do not understand his unwillingness to find that the Respondent has *again* violated the Act in these circumstances.

certified by the National Labor Relations Board as the exclusive collective bargaining representatives as determined by the election conducted by the National Labor Relations Board of November 29, 1944.

Since about 1944, and at all times thereafter, the Union has been the designated exclusive collective-bargaining representative of the unit employees and has been recognized as the representative by the Respondent. Recognition has been embodied in a series of collective-bargaining agreements, the most recent of which had a term of May 16, 1996, to May 16, 1997. At all times since 1944, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit employees.

B. Refusal to Comply with the Contract

The Respondent has failed and refused to continue in effect all the terms and conditions of the collective-bargaining agreement since August 31, 1996, by failing to remit payments to the contractually established pension fund.

The contractual provisions by which the Respondent failed to abide relate to wages, hours, and other terms and conditions of employment in the unit and are mandatory subjects for purposes of collective bargaining.

CONCLUSION OF LAW

By failing since about August 31, 1996, to abide by the terms of the collective-bargaining agreement between the Respondent and the Union by failing to remit payments to the pension fund, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) of the Act and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designated to effectuate the policies of the Act.

We shall order the Respondent to make whole unit employees by making the required pension fund payments it failed to make since August 31, 1996.² We shall further order the Respondent to reimburse employees for any expenses ensuing from the Respondent's unlawful failure to make the contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enf. 661 F.2d 940 (9th Cir. 1981), the amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

² Any additional amounts owed with respect to this fund contributions shall be calculated in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

ORDER

The National Labor Relations Board orders that Respondent, Endicott Forging and Manufacturing, Inc., Endicott, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to bargain with the Union by failing to make required contributions on behalf of its unit employees to the pension fund.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Pay into the pension fund, on behalf of its unit employees, those contributions it failed to make as a result of the unlawful discontinuation of fund payments, in the manner set forth in the remedy section of this decision.

(b) Make whole the unit employees for any expenses suffered as a result of the Respondent's failure to make the required fund contributions, in the manner set forth in the remedy section of this decision.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of back-pay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Endicott, New York, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 31, 1996.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region at-

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

testing to the steps that the Respondent has taken to comply.

MEMBER HURTGEN, dissenting.

I would not grant summary judgment in this case. The Respondent, in its answer to the complaint, asserted that its failure to make contractually required, pension fund payments resulted from its financial condition, and that it was willing to meet with the Union at any time to try to resolve the matter.

My colleagues conclude that the Respondent has modified the contract, in violation of Section 8(a)(5). They are unwilling to listen to Respondent's plea that its failure to pay was because of financial conditions. Nor are they willing to consider Respondent's assertion that it offered to meet with the Union to come up with a satisfactory adjustment of the dispute.

I would listen to, and consider, these matters. This is not an employer who has repudiated the contract. Nor is this an employer who has ignored the Union. To the contrary, according to the answer, Respondent has simply been financially unable to make contributions to the fund for a limited period of time, and has offered to meet with the Union in order to work out a satisfactory resolution of the problem. Assuming that the Respondent proves its answer, the Board should, at most, treat this conduct as a breach of contract necessitated by financial conditions, and the Board should give the parties an opportunity to resolve the problem.¹

The above approach favors negotiation over litigation and confrontation. I endorse that approach.²

¹ I agree with the dissenting opinion in *Zimmerman Painting*, 302 NLRB 856, 859 (1991).

² I recognize that there are prior Board orders against this Respondent. 319 NLRB 1 (1995) and 319 NLRB 180 (1995); 322 NLRB No. 4 (1996) (not reported in Board volumes); and 323 NLRB No. 128 (1997) (not reported in Board volumes). But, those cases are of the same kind as the instant one. Those cases strongly suggest that litigation and Board orders are not the answers to the problem. Contrary to

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain with the Union as the exclusive collective-bargaining representative of our unit employees by failing and refusing to provide contractually required contributions to employees' pension funds.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL restore the employees' pension funds and WE WILL make them whole by reimbursing employees for any losses or expenses they may have incurred during the period in which we failed to maintain contractually required contributions to employees' pension funds.

ENDICOTT FORGING AND MANUFACTURING,
INC.

my colleagues, I would not characterize Respondent as a "recidivist," i.e., one who repeatedly thumbs its nose at the NLRA. Rather, it is apparent that Respondent is a financially troubled employer who seeks to work out its problems with the Union.